In the Matter of the Compensation of
PHILIP SAPPINGTON, Claimant
WCB Case No. 21-03365
ORDER ON REVIEW
Alana C Dicicco Law, Claimant Attorneys
Travis L Terrall Atty At Law, Defense Attorneys

Reviewing Panel: Members Curey, Ceja, and Wold. Member Curey dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Wren's order that set aside its "ceases" denial of claimant's combined left knee condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's denial, the ALJ relied on the opinion of Dr. Buuck, an orthopedic surgeon, over the opinions of Drs. Ballard (orthopedic surgeon), Cann (physical medicine and rehabilitation specialist), and Wimmer (orthopedic surgeon), all of whom examined claimant at the employer's request. The ALJ concluded that the employer had not carried its burden to prove that the compensable injury was no longer the major contributing cause of claimant's disability or need for treatment of the combined left knee condition as of December 27, 2019.

On review, the employer contends that the opinions of Drs. Ballard, Cann, and Wimmer persuasively established a "change" in claimant's circumstances to support the "ceases" denial. For the following reasons, we find that the employer has not met its burden to show that the previously accepted left knee strain and left knee medial meniscus tear were no longer the major contributing cause of claimant's disability or need for treatment of the combined condition.

ORS 656.262(6)(c) authorizes a carrier to deny an accepted combined condition if the "otherwise compensable injury" ceases to be the major contributing cause of the combined condition. The carrier bears the burden to establish a change in the claimant's condition or circumstances from the effective date of the combined condition acceptance such that the "otherwise compensable injury" is no

longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Walmart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008); *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006); *State Farm Ins. Co. v. Lyda*, 150 Or App 554, 559 (1997) (changed circumstances is a prerequisite for denial of an accepted combined condition). Where the carrier has the burden of proof under ORS 656.266(2)(a), the evidence supporting its position must be persuasive. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).[1]

In analyzing a "ceases" denial under ORS 656.262(6)(c), the contributions of the component parts of the combined condition are evaluated; *i.e.*, the "otherwise compensable injury" and the statutory preexisting condition. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 803 (2013); *Christopher L. Rowles*, 66 Van Natta 1445, 1454 (2014). The "otherwise compensable injury" is the previously accepted condition, rather than the work-related injury incident. *Brown v. SAIF*, 361 Or 241, 282 (2017); *Barbara J. DeBoard*, 71 Van Natta 550, 553-55 (2019). Therefore, a carrier may deny the accepted combined condition if the medical condition that the carrier previously accepted ceases to be the major contributing cause of the combined condition. *Brown*, 361 Or at 282.

Resolution of the issue is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279 (1993); *Lindsy E. Dean*, 71 Van Natta 890, 891 (2019). We rely on medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

Here, the combined left knee condition was accepted as of the date of injury, February 12, 2019**.** (Ex. 30-1).[2] Thus, that date is the "baseline" for determining whether there was a change in the combined condition. Moreover, the denial of the combined condition stated that, as of December 27, 2019, the accepted conditions were no longer the major contributing cause of the disability or need for treatment for the combined condition of "left knee strain and left knee medial

[1] We assume, without deciding, that the record establishes a combined condition.

[2] Because the Modified Notice of Acceptance did not specify a date other than February 12, 2019, the date of the Initial Notice of Acceptance, the effective date of the combined condition acceptance is also February 12, 2019. *See Bacon*, 208 Or App at 210; *Paul A. Harvey*, 73 Van Natta 24, 28 (2021) (where a modified notice of acceptance does not specify a date different from the date of the original notice of acceptance, the effective date of the modified acceptance is based on the effective date of the prior, or initial, acceptance).

meniscus tear combined with pre-existing arthritis of the left knee." (Ex. 31-1). Accordingly, the employer must establish a change in claimant's condition between February 12 and December 27, 2019, such that the previously accepted condition (left knee strain and left knee medial meniscus tear) ceased to be the major contributing cause of the disability or need for treatment for the combined condition. ORS 656.262(6)(c); ORS 656.266(2)(a); *Brown*, 261 Or at 282.

After evaluating the evidence, we find that the opinions of Drs. Ballard, Cann, and Wimmer do not persuasively establish that claimant's "otherwise compensable injury" ceased to be the major contributing cause of the disability or need for treatment of the combined condition.

On March 17, 2021, Dr. Ballard, examined claimant at the employer's request. (Ex. 27-1). During that examination, Dr. Ballard noted that claimant had preexisting arthritis that was not diagnosed or treated prior to his compensable injury and that was asymptomatic. (Ex. 27-7). He also noted that claimant's compensable injury combined with the preexisting condition to cause the need for treatment. (Ex. 27-8). Dr. Ballard opined that claimant continued to have symptoms with permanent aggravation of his underlying arthritis secondary to the work-related exposure. (*Id*.) He explained that claimant's increased knee symptoms were a combination of the left knee surgery and preexisting arthritis, and claimant's preexisting arthritis itself was aggravated and progressed secondary to work-related exposure. (*Id*.) He stated that claimant had permanent impairment, with 60 percent due to the compensable injury. (Ex. 27-9). Thus, Dr. Ballard opined that the major contributing cause of claimant's disability and need for treatment was his compensable injury. (Ex. 27-8).

Yet, on June 28, 2021, Dr. Ballard signed a concurrence letter from the employer which stated that the major contributing cause of claimant's ongoing symptoms, need for treatment, and disability after December 27, 2019, was not his compensable condition but rather was his preexisting arthritic condition. (Ex. 28-2). The letter attempted to reason that even though claimant did not have arthritic symptoms prior to his compensable injury and developed arthritic symptoms post injury, the major cause of the physiological or pathological worsening of those arthritic symptoms was not the compensable injury. (Ex. 28-2). The concurrence noted that the nature of arthritis is to worsen and cause increased symptoms with the passage of time, but did not address why, in analyzing claimant's current combined condition, he believed that claimant's symptoms were due in major part to his previously asymptomatic arthritis instead of his accepted left knee condition. (*Id*.)

Ultimately, although Dr. Ballard's later opinion noted that the major cause of claimant's combined condition was the preexisting arthritis, his later opinion did not persuasively explain the inconsistencies between that stance and his previous opinion. (Exs. 27, 28). Therefore, without further explanation for the inconsistencies, we find Dr. Ballard's opinion unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Nayef Salem*, 74 Van Natta 187, 189 (2022) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

Additionally, Dr. Cann opined that claimant's compensable injury ceased to be the major cause of his need for treatment and disability by the time his condition was declared medically stationary on December 27, 2019. (Ex. 32-2). However, Dr. Cann based her opinion on when claimant "should have recovered from meniscal surgery" and not on claimant's specific circumstances. (*Id*.) Further, she did not consider the impact of the compensable meniscal tear combining with claimant's preexisting arthritis. (*Id*.) Therefore, we find her opinion unpersuasive. *See Young*, 219 Or App at 419; *Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive); *David D. Montgomery*, 71 Van Natta 8, 10 (2019) (physician's opinion that did not address the claimant's personal circumstances and was based on his general understanding was unpersuasive).

Finally, we find Dr. Wimmer's opinion unpersuasive, as it appears that he did not adequately address claimant's "combined condition."

Dr. Wimmer examined claimant at the employer's request and opined that his left medial meniscus tear was related to his work incident, but was not medically stationary. (Ex. 8-9). He noted that claimant had preexisting left knee osteoarthritis, which was not related to the particular claim, and that there was no evidence that claimant's osteoarthritic knee changes had been significantly changed or worsened from the work event. (Ex. 8-9). Dr. Wimmer merely opined that claimant had a longstanding arthritic condition that had developed prior to the work injury. (Ex. 29-1).

Although Dr. Wimmer provided these explanations, he failed to address the relative contribution of the injury to claimant's need for treatment or disability for the combined condition. (Ex. 29-2). Instead, his opinion focused on claimant's expected and observed post-meniscal surgery recovery course. (*Id*.)

Moreover, Dr. Wimmer stated that he could only speak in "generalities" that claimant's injury had combined with preexisting arthritis, likely resulting in some further tearing of the medial meniscus, and that "claimant's symptoms after returning to work were likely caused in major part by his pre-existing arthritic condition." (*Id*.)

We find that Dr. Wimmer's analysis, focusing on a hypothetical combining, did not adequately weigh the contribution of the work event to the combined condition. We therefore find it unpersuasive. *See Keith Zimmerman*, 74 Van Natta 35 (2022) (physician's hypothetical combined condition opinion was conclusory and not well explained because it did not persuasively weigh the relative contribution of the "otherwise compensable injury"); *Theron L. Lewis*, 73 Van Natta 150, 157 (2021) (physician's hypothetical opinion was unpersuasive because it did not adequately weigh the contribution of the "otherwise compensable injury").

In sum, Dr. Ballard did not explain the inconsistencies between his March 17 and June 28, 2021, opinions. The opinions of Drs. Cann and Wimmer focused on the expected resolution of the compensable meniscus tear post surgery, but did not persuasively consider the effect of the combination of the meniscus tear and the previously asymptomatic arthritis on the need for treatment.

Consequently, the record does not persuasively establish that claimant's "otherwise compensable injury" ceased to be the major contributing cause of his need for treatment or disability for his "combined condition" by December 27, 2019. *See Jonathan C. Farrell*, 74 Van Natta 295, 299 (2022) (where a physician's opinion did not designate when the claimant's combined condition changed from being attributable to an exacerbation of arthritis from the compensable injury to being attributable to the preexisting arthritis, the "ceases" denial was set aside); *Eric V. Gottfried*, 73 Van Natta 845, 849 (2021) (setting aside the carrier's "ceases" denial when the carrier did not establish the requisite change in the claimant's combined condition). Accordingly, we affirm the ALJ's order.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is $8,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee

submission), the complexity of the issue, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated March 18, 2022, is affirmed. For services on review, claimant's attorney is awarded an assessed attorney fee of $8,000**,** to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on June 9, 2023

Member Curey, dissenting.

The majority affirms the ALJ's compensability decision. Because I would find that the medical evidence establishes that the "otherwise compensable injury" ceased to be the major contributing cause of the combined condition, I respectfully dissent. I reason as follows.

Here, the combined left knee condition was accepted as of the date of injury, February 12, 2019, and the employer argued that the accepted injury was no longer the major contributing cause of the disability or need for treatment for the combined condition as of December 27, 2019. (Exs. 30-1, 31-1). Accordingly, the employer must establish a change in claimant's condition between February 12 and December 27, 2019, such that the previously accepted conditions (left knee strain and left knee medial meniscus tear) ceased to be the major contributing cause of the disability or need for treatment for the combined condition. ORS 656.262(6)(c); ORS 656.266(2)(a); *Brown v. SAIF*, 261 Or at 282.

Although the majority discounts Drs. Wimmer, Cann, and Ballard by asserting that their opinions are unexplained, I find that their opinions are well reasoned and thoroughly explained and that they evaluated alternative causes and

relied on the medical record. Thus, after evaluating the evidence, I find that the employer satisfied its burden of proving that the previously accepted conditions ceased to be the major contributing cause of the combined condition as of December 27, 2019.

Drs. Wimmer, Cann, and Ballard all agreed that claimant's otherwise compensable injury and subsequent surgery were no longer the major contributing cause of his combined condition as of December 27, 2019. Dr. Wimmer, who examined claimant and reviewed his records and imaging, opined that although the work injury and subsequent surgery likely had some contribution to his symptoms, need for treatment, and disability, it was not medically probable that the work injury was the major cause. (Ex. 29-2). He noted that while a meniscus injury and partial removal can accelerate arthritis, it was not medically probable that claimant's injury had done so because x-rays taken in 2020 displayed only mild progression of the arthritis, consistent with the degenerative process. (*Id*.) Furthermore, as claimant had no significant left knee symptoms in September and October 2019, he opined that it was likely that claimant had recovered from his June 2019 left knee surgery by that time. He further opined that it was medically probable that the work injury was no longer the major cause of claimant's need for treatment or disability for his combined condition as of at least December 27, 2019. (*Id*.)

Thus, because Dr. Wimmer's opinion was well reasoned, relied on imaging studies, and evaluated alternative causes for claimant's condition, I find his opinion persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight is given to those medical opinions that are well reasoned and based on complete information); *Michelle R. Wharton*, 68 Van Natta 1912, 1917-18 (2016) (physician's opinion that weighed alternative causes for the claimant's condition was persuasive).

Likewise, Dr. Cann opined that claimant's previously accepted conditions ceased to be the major cause of claimant's need for treatment or disability by the time claimant was declared medically stationary in relation to the work injury on December 27, 2019. (Ex. 32-2). She explained that a patient should recover from a meniscus surgery within a few months and that, in claimant's case, once he had recovered from his June 2019 left knee surgery it was medically probable that his ongoing need for treatment and disability would be caused in major part by the preexisting arthritis. (*Id*.) Therefore, I find her opinion persuasive. *See Kyle Devlin*, 70 Van Natta 1214, 1215 (2018) (physician's opinion that considered general statistics was persuasive where the physician also addressed the claimant's

medical history, treatment, and mechanism of injury); *Craig C. Show*, 60 Van Natta 568, 576-77 (2008) (finding the more detailed, accurate, and better explained medical opinion to be persuasive).

Moreover, the majority discounts Dr. Ballard by conflating his opinion regarding impairment with his opinion on causation. Dr. Ballard opined that 60 percent of claimant's disability or permanent impairment was due to the compensable injury with the aggravation of underlying arthritis and progression of arthritis. (Ex. 27). However, Dr. Ballard addressed causation differently and concluded that the major contributing cause of claimant's ongoing symptoms, need for treatment, and disability after December 27, 2019, was his preexisting arthritic condition. (Ex. 28-2). Dr. Ballard explained that claimant's work injury consisted of further tearing of his medial meniscus, but that did not result in acceleration of the arthritic process itself and that claimant's increase in left knee symptoms, as noted in November 2019, was due to preexisting arthritis. (*Id*.)

Because Dr. Ballard offered a thorough explanation for his causation opinion, I find that his opinion is persuasive and supports the employer's burden of proof. *See Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (changed opinion persuasive where there was a reasonable explanation for the change); *Lynn Eberhardt*, 74 Van Natta 59, 62 (2022) (physician's change of opinion based on further consideration was reasonably explained).

Under such circumstances, I would find that the opinions of Drs. Wimmer, Cann, and Ballard do persuasively establish a change in claimant's circumstances or condition such that the "otherwise compensable injury" was no longer the major contributing cause of the accepted combined left knee condition as of December 27, 2019. *See Kurtis L. Kohl*, 66 Van Natta 1796, 1802 (2014) (physician's opinion as a whole, read in context, persuasively established a change in the claimant's condition sufficient to meet the carrier's burden of proof under ORS 656.266(2)(a)); *Show*, 60 Van Natta at 576-77.

Because the majority concludes otherwise, I respectfully dissent.